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Report on the Annual Tax Treaty Case Law Around the Globe Conference held at Tilburg University, the Netherlands

Laurens Wijtvtliet* *Orbis terrarum liber est, et illi qui non commeant modo unam paginam legunt*** St Augustine

I INTRODUCTION

In the above quotation, St Augustine underlines the importance of travel. By travelling, people can gain insight into other people's customs, uses, ideas and outlooks. Although a great many centuries have passed since the Church Father wrote his famous words, they are still of great importance to us today. It could even be argued that these words are of value to tax scholars and practitioners. This was once again shown at the second edition of the Tax Treaty Case Law around the Globe Conference, which was organized by the European Tax College¹ in cooperation with the Institute for Austrian and International Tax Law.² After a pilot in Tilburg in 2010 and a first full edition in Vienna in 2011, this year's edition took place at Tilburg University, The Netherlands, on 14–16 June 2012. The conference highlighted a total of thirty-seven cases (all of which had been decided in 2011) covering twenty-four jurisdictions from five different continents. The main topics discussed at the conference focused on seven main themes in tax treaty law, which were elucidated by panels of internationally renowned experts in the field of tax treaty law. Separate sessions were devoted to each of the subjects, starting with the scope and interpretation of the residence principle. Permanent establishments were discussed next, followed by an examination of business profits and capital gains. Attention was subsequently shifted to dividends, interest and beneficial ownership, whereupon the – sometimes vague and arbitrary – distinction between royalties and labour income was at the forefront. The penultimate session dealt with the avoidance of double taxation and mutual assistance. The conference was concluded by several presentations on non-discrimination.

Participants were invited to exchange their views on the impact of these cases on the interpretation and application

of tax treaties applicable in their home countries. The general aim of the conference was not only to exchange knowledge but also to identify lesson learned in other jurisdictions and to assess whether there is a need to amend or adjust existing tax treaties. The conference was chaired by Professor Eric Kemmeren with Dr Daniël Smit as co-chair. This article briefly highlights some of the main points raised during the conference. For a complete overview of the conference proceedings the reader is kindly referred to the book "Tax Treaty Case Law around the Globe 2012" (editors Eric C.C.M. Kemmeren and Daniël Smit), which will be published by IBFD in due course.

2 REPORT ON THE CONFERENCE

2.1 Residence

2.1.1 Attribution of Income: *Russell v. Commissioner of Taxation*

The first topic discussed was the scope and interpretation of the residence principle. Professor Graeme Cooper from the University of Sydney unfolded the facts of the Australian case of *Russell v. Commissioner of Taxation*.³ This case concerned Mr Russell, an accountant from New Zealand who had relocated with his wife to Australia in 2000. Using a New Zealand company that was supposedly fully owned by his wife, Mr Russell tried to convert income from employment and services into business profits, thereby triggering Australia's rules against the diversion of income from employment and services into companies, which Cooper aptly described as 'CFC legislation for humans'. The issue before the court was whether the income was attributable to Mr Russell or to the New Zealand company. In the latter case, Russell

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** The world is a book, and those who do not travel read only one page.

¹ See further, <http://www.europeantaxcollege.com>.

² See further, <http://www.wu.ac.at/taxlaw>.

³ Full Federal Court of Australia, 4 Feb. 2011.

argued, Australia could only tax the amounts in the hands of the New Zealand company if there was a permanent establishment in Australia.

The Court argued that the Australia–New Zealand double tax treaty would only protect the profits from Australian taxation if they were taxable in the hands of an identifiable taxpayer according to Australian law. However, as the mechanism used in the legislation removed any personal services income attributed directly to the worker from the assessable income of the recipient company, the Court held that the taxation of Mr Russell's personal services was not taxation of the profits of the enterprise. The income had thus been rightfully attributed to Mr Russell.

2.1.2 The Status of the OECD Commentaries

In the *Russell* case, the Court also considered an argument about the interpretation of tax treaties in Australian courts and the significance to be attached to the Commentary to the OECD Model. After all, Australia is a member of the OECD and Australia's treaties typically follow the Model text. The Court noted that Australia's High Court had recently reconsidered the norms for interpreting treaties that are enacted as part of municipal law (of which tax treaties are part) so that 'care in referring to material concerning international instruments' is called for.

A diverging approach was taken by the Antwerp Court of Appeals in its decision of 21 June 2011,⁴ which was discussed by Professor Luc de Broe from the Catholic University of Leuven. Central to this case was the qualification of a term undefined under the tax treaty concluded between Belgium and the Netherlands. In this case, a Belgian resident manager who worked as an independent contractor for a Belgian company with limited liability had, for a significant part of the taxable year 2003, carried out activities in the Netherlands. This led him to claim an exemption for his salary relating to his Dutch activities under the 2001 Belgium–Netherlands tax treaty. The Belgian tax authorities refused to grant him this exemption, stating that his income was covered by Article 14 of the treaty (independent personal services). The Court of Appeals noted that the term 'employment' was not defined in Article 15 of the double tax convention (DTC). Article 3(2) therefore compelled the Netherlands to apply the term as construed under Dutch law, which qualified the contract as an employment relationship.

Both countries thus attributed different qualifications to the contract.

In solving this qualification conflict, the Court referred to the OECD Commentary to Article 23, according to which Belgium had to follow the Dutch qualification. The Court subsequently dilated upon the status of the OECD Commentary, labelling it 'non-binding soft law' that has 'a certain interpretative value'. The Court considered its value even more significant 'a fortiori where the Commentary precedes the DTC'. In the case at hand, the 2000 OECD Commentary preceded the 2001 tax treaty and neither Contracting State had made an observation to the Commentary. The Court, therefore, had no objections to the interpretation of the treaty using the 2000 Commentary.⁵ Consequently, the Netherlands were allowed to tax the income under Article 15 of the Treaty. However, according to the same treaty, Belgium only has to provide relief if the income 'in accordance with the provisions of [the] DTC, is taxed in the Netherlands'. The question then became whether 'taxed in the Netherlands' was to be interpreted as 'subject to tax' or 'liable to tax'.

2.1.3 Subject to versus Liable to Tax: The Portugal–Switzerland Treaty

In deciding the interpretation of 'taxed in the Netherlands', the Court referred to 1971 Belgian Supreme Court case law according to which income taxed abroad is income that is subject to a tax regime in the Source State, regardless of whether it had actually been taxed or not. As the taxpayer was unable to prove that his income had been subject to the Dutch tax regime, he was not entitled to double tax relief.

This decision stands in contrast with the case that was subsequently discussed by Dr Daniel de Vries.⁶ In this case, tax liability under the Portugal–Switzerland tax treaty was found to be determinative for the residence of a company with domicile in the free trade zone of Madeira. Although the Madeira parent company was only subject to a special regime of lump-sum taxes⁷ and not subject to income tax, its Swiss subsidiary was able to claim a refund on dividends distributed to the parent. Furthermore, the Court ruled that the refund was not dependent on the condition that the dividends were effectively taxed in the hands of the beneficiary.

The Swiss Federal Administrative Court (FAC) ruled that the residency criteria for treaty purposes are based on the taxpayer being liable to tax under the laws of the

Notes

⁴ Antwerp Court of Appeals, 21 Jun. 2011, TFR 2011/62.

⁵ In their Circular Letters 2004/2010 B, the Belgian tax authorities have confirmed the position that the source state characterization is binding upon Belgium as residence State.

⁶ Swiss Federal Administrative Court, 7 Sept. 2011, no. A-813/2010 (*Madeira Case*).

⁷ During the subsequent discussion, Professor Nogueira clarified that instead of lump sum taxes, in the free trade zone of Madeira license fees are due. Moreover, the application of these fees is of a temporary nature.

residence State. In doing so, the FAC also referred to the Swiss–EU Savings Agreement, under which the Swiss tax administration took a more liberal stance than it did in the case at hand. To enjoy treaty benefits, the sole criterion is that the taxpayer, by reason of his domicile, residence, place of management or any other criterion of a similar nature, be liable to tax under the laws of that state. It should be noted that tax liability need not necessarily result in effective taxation of income and capital as exemptions may apply under the laws of the residence State.

During the discussion that followed, Professor Michael Lang of the Institute for Austrian and International Tax Law remarked that it is probably not justified to compare rules concluded under a double tax treaty with European Union (EU) Law, unless there is some indication that the drafters of the tax treaty had European Law in mind.

2.2 Permanent Establishment

2.2.1 Service PEs: *Das etwas Andere das Beste*

On the subject of permanent establishments, Dr Danuše Nerudová presented a case about the so-called service permanent establishment (PE) that was brought before the Czech Supreme Administrative Court.⁸ As it turned out, tax treaties that were concluded by the Czech Republic before 1993 do not contain any separate provision and time threshold for service PEs. Both elements have only been included in treaties concluded as of 1993. Consequently, the 1979 Austria and (former) Czechoslovakia treaty did not contain any specific provisions regarding service PEs.

In the case at hand, a Czech company acted as an intermediary for nurses and au pairs for families in Austria and Germany. The au pairs were mainly paid in the Czech Republic and Slovakia. The Czech company opened a bank account in Linz (Austria), which had an annual inflow of approximately Euros (EUR) 3 million. The Czech company did not record these funds in its books, nor did it include them in the tax base. At issue was whether the funds had been rightfully excluded from the tax base, or that the funds constituted a service PE in Austria. After several hearings and proceedings before the tax authorities and the regional court, the case was brought before the Czech Supreme Administrative Court. The Court expressed the opinion that as Article 5 of the 1979 Austria–Czechoslovakia double tax treaty does not explicitly mention the service PE, domestic law qualifications cannot be applied. In the absence of a specific provision, the Court took the view that a service PE can only arise when the condition of a fixed place of

business is fulfilled. In coming to their decision, the Czech judges for the first time in history referred to the OECD Commentary, saying that it can be used as an interpretative tool.

2.2.2 Construction PEs

In a Greek case⁹ presented by Dr Katerina Perrou, a consortium of a Greek SA and an Austrian GmbH entered into a contract that involved the maintenance of a construction site in Greece for more than twelve months. The consortium was fiscally transparent and therefore did not form a taxable entity in Greece. The project itself was split and the Austrian company only undertook the study and the development of the industrial design required for the project and supplied part of the necessary equipment. The Austrian company also supervised the installation of the equipment. It did not, however, have physical presence on Greek soil. In addition, the contract included a clause that provided for the joint and several liability of the members of the consortium. Although the judges were not unanimous in their decision, the majority held that the Austrian SE did not acquire a permanent establishment in Greece. In its decision, the Court stated that the ‘joint and several liability’ clause of the contract did not extend to the fiscal status of each company, which, by consequence, had to be determined individually for each company.

The main observation made by Dr Perrou was that a clause in a contract that provides for ‘joint and several liability’ is not in itself enough to lead to the creation of a PE. In fact, the physical presence of the non-resident company is required. During the discussion of this case the question was raised by Professor Dr Alfred Storck of the Institute for Austrian and International Tax Law what would happen if the Austrian company were involved in the supervision of the construction activities. Besides, the Court noted that according to the Commentary to Article 5 liability itself could even give rise to a permanent establishment.

Another interesting point about permanent establishments was made by Professor Pasquale Pistone of the Institute for Austrian and International Tax Law. In discussing a case he characterized as ‘the latest developments in the Philip Morris Italian saga on subsidiaries as permanent establishments’,¹⁰ Pistone observed that for more than ten years, the Italian Supreme Court has been consistently following the line of reasoning set out in its Philip Morris decision. He further noted that in Italy, the OECD Commentaries continue to play an almost insignificant role in the interpretation and application of tax treaties.

Notes

⁸ Czech Supreme Administrative Court, 13 Jan. 2011, no. Afs 66/2010-189.

⁹ Greek Supreme Administrative Court, 16 Mar. 2011, no. 838/2011.

¹⁰ Italian Court of Cassation (*Corte di Cassazione*), 22 Jul. 2011, no. 16106.

2.2.3 Agency PE: *Dell Products v. the State*

Professor Frederik Zimmer from the University of Oslo, Norway discussed the case of *Dell Products v. the State*.¹¹ The case concerned a company of the Dell group that had been established under Dutch law but that resided in Ireland for tax purposes. This group company bought equipment from other group companies and subsequently sold the equipment on the Norwegian market by way of the group company Dell AS, which was a tax resident of Norway and acted as a commissionaire for Dell Products.

According to Norwegian law, a commissionaire acts in its own name. Consequently Dell Products – its principal – was not legally bound by the contracts entered into by the commissionaire. Before the Court, the moot point was whether Dell AS had ‘an authority to conclude contracts in the name of the enterprise’,¹² which would give rise to a PE in Norway. In contrast to the lower courts, the Supreme Court unanimously found that the answer was no. In the Court’s opinion the words ‘in the name of’ should be understood to mean that the principal must be legally bound by the contracts concluded by the commissionaire. The Court founded its view on the wording of the OECD Model Treaty and no convincing arguments to the contrary had been put forward. Moreover, history has shown that section 32.1 of the OECD Commentary to Article 5 is not confined to cases where the agent concludes a contract ‘literally in the name of the enterprise’. Rather, the wording was included to make clear that the rule should also apply under UK law, according to which the principal is bound by a contract entered into by a commissionaire, even when it is not in name of the principal. Professor Zimmer noted that the Court based its ruling specifically on the French *Zimmer* case. Furthermore, the Court also referred to the fact that the commissionaire arrangements of the Dell group had been accepted as not to constitute a PE in fifteen other European countries.

2.3 Business Profits and Capital Gains

2.3.1 Transparency versus Translucidity

Professor Marilyne Sadowsky opened the session on the third theme of the day by discussing a French Supreme Court case on the taxation of non-resident partners to partnerships.¹³ In this case, a Norwegian firm acted as the 99% partner in a French partnership that restored and

rebuilt French real estate in order to sell it at a profit. The Norwegian partner failed to declare its income in France and the question arose whether the profits derived from the sale of the real estate were taxable in France or in Norway. More specifically, the issue was whether the Franco–Norwegian DTC applied to the non-resident partner or to the partnership. In this respect, the French rules for the taxation of partnerships differ a great deal from those set out in the OECD Model and its accompanying commentaries.

If a transparency approach is applied, the partners to a partnership are considered taxpayers and DTCs do not apply to partnerships themselves. The French adhere to the fundamentally opposite theory of translucency, which considers the partnership itself to be a taxpayer and thus brings it within the scope of the DTCs. The individual partners are liable to tax on their own share. Since French law dictates that the profits of the partnership be taxed in France in the hands of the partners, including non-residents, the profits of the Norwegian partner were taxable in France. The Supreme Court went on to confirm that tax treaties drafted according to the OECD Model do not preclude France from applying this approach, unless the respective treaty contains specific provisions that state otherwise. Incidentally, Sadowsky noted that the current French approach is under discussion and that reform could be on its way.

2.3.2 Passive Income

Next, Professor Alexander Rust highlighted two German cases that dealt with the interpretation of the term ‘business income’ in Article 7 of the OECD Model. The first case discussed by Professor Rust dealt with the application of a term that is interpreted differently by two Contracting States.¹⁴ Under domestic law, Germany applies a fiction according to which passive income earned by a partnership can, under certain circumstances, be deemed business income. The German Federal Finance Court stated that this fiction could not be attributed any meaning in an international context. In the Court’s opinion, interpretation in light of domestic law could lead to the situation where Contracting States interpret the term differently, which would be contrary to the goal of a common interpretation.

The same view was upheld by the Court in its decision of 25 May 2011.¹⁵ This case concerned a German limited partner to a Hungarian partnership that conducted asset

Notes

¹¹ Norwegian Supreme Court, 2 Dec. 2011, *Dell*, no. HR-2011-02245-A.

¹² In this case, the enterprise being the taxpayer.

¹³ French Supreme Court, 11 Jul. 2011, no. 317024, plén., *Société Quality Invest*.

¹⁴ German Bundesfinanzhof, 4 May 2011, II R 51/09, IStR 2011, 635.

¹⁵ German Bundesfinanzhof, 25 May 2011, II R 95/10, IStR 2011, 688.

management. The partnership was subject to corporate income taxation in Hungary. According to German domestic law, the proceeds from the asset management were to be recharacterized as business income if the unlimited partner is a corporation and if the corporation manages the partnership. The issue boiled down to whether the German tax authorities should provide relief to the German partner through the exemption method, which is applied to active income, or by way of the credit method for passive income. Again, the Court stated that an autonomous interpretation was required. The Court added that Article 7(7) of the Germany–Hungary double tax treaty gives preferences to Articles 10, 11 and 12, unless there is a permanent establishment in the Source State.

2.3.3 Transfer Pricing Guidelines: Commissioner of Taxation v. SNF (Australia) Pty. Ltd.

In making his second appearance of the day, Professor Cooper discussed a transfer pricing case that involved an Australian resident distributor of chemicals that it purchased from related offshore suppliers in France, the United States of America, and China.¹⁶ Intra-group prices were determined by the French holding company. I will not go into the details of this case, but limit myself to an eye-catching statement regarding the OECD Transfer Pricing Guidelines. In pleading his case, the Commissioner had argued that the Guidelines called for a very strict interpretation of comparability tests. The Court rejected the Commissioner's arguments and noted that the treaties Australia had concluded with France, the US, and China each contained an equivalent to Article 9 of the 2010 OECD Model. While the Commentary to the Model was relevant to the interpretation of the treaty, it provided no support for the strictness of the comparability tests administered by the Commissioner. Moreover, the OECD Transfer Pricing Guidelines were not part of the Commentary and were merely guidelines. Under the Vienna Convention, the Guidelines might be examined if they reflected subsequent agreement or practices of the treaty parties that 'establishes the agreement of the parties regarding its interpretation'. However, this would require evidence that 'each of China, the US and France had either agreed to apply the portion of the guidelines relied upon (...) or that it was their practice to do so'. No such evidence was provided, leading the Court to rule that the Guidelines could not be used to interpret the meaning of Australia's domestic transfer pricing laws.

2.3.4 Transfer of Losses: Saipem UK Limited v. the Queen

Jacques Sasseville, head of the OECD's Tax Treaty Unit, discussed the case of *Saipem UK Limited v. the Queen*¹⁷ on the transfer of losses upon liquidation between a Canadian corporation and the Canadian PE of a UK corporation.

A Canadian permanent establishment of the UK resident company Saipem Energy had realized losses in 2001 through 2003. During that period, Saipem Energy was a subsidiary of the Dutch resident company Saipem International BV. Saipem UK, who was a UK resident, was also part of the group. In 2003, Saipem Energy was transferred into Saipem UK in order to facilitate the reorganization of the Saipem Group in the UK. In the end, Saipem Energy was wound up. Under Canadian domestic tax law, business losses of a 90% subsidiary that is wound up remain available to the parent company. However, that benefit only applies to companies that are residents of Canada *and* that were either incorporated in Canada or have been continuously resident in Canada since 1971. According to the tax inspector, Saipem Energy and Saipem UK did not qualify as 'Canadian corporations' and losses would not be eligible for carry-over. The taxpayer disagreed and argued that the losses should be available pursuant to Article 24, paragraphs one (nationality non-discrimination rule) and three (PE non-discrimination rule) of the OECD Model.

With regard to Article 24(1) of the OECD Model Treaty, the Tax Court ruled amongst other things that the taxpayer was not discriminated based on 'nationality', that is, on the laws on incorporation, but on the basis of residence. Using a company incorporated in Canada but not resident in Canada as a comparator, the Court went on to note that a resident and a non-resident are not in the same circumstances. Loss carry-over was therefore not possible. In reference to Article 24(3), the Court endorsed the view expressed in the Commentary that the PE non-discrimination rule applies to the taxation of the permanent establishment's own activities. In the eyes of the Court, the PE non-discrimination rule does not, however, extend to rules that take account of the relationship between an enterprise and other enterprises. The Court did not give an opinion on whether, in accordance with Article 24(3), two local PEs should be allowed to consolidate or transfer losses where a country's domestic law allows consolidation or the transfer of losses between two domestic companies. The case of *Saipem UK Limited v. the Queen* concerned the transfer of losses of

Notes

¹⁶ Full Federal Court of Australia, 1 Jun. 2011, *Commissioner of Taxation v. SNF (Australia) Pty. Ltd.*

¹⁷ Canadian Supreme Court, 14 Jan. 2011, No. 2008-2540(IT)G, *Saipem UK Limited v. the Queen*.

a permanent establishment that had ceased to exist. The taxpayer claimed losses that a domestic company would not have been able to claim. Therefore, the taxpayer could not claim carry-over for the PE losses. In a short decision, the Federal Court of Appeal confirmed the Tax Court's decision. In doing so, it stressed the difference between 'nationality' and 'residence' and emphasized that there was no 'less favourable treatment' of the Canadian permanent establishment.

2.3.5 Capital Gains: Vodafone International Holdings BV v. Union of India

The session on business profits and capital gains was concluded with a discussion of the *Vodafone* case by Philip Baker QC.¹⁸ The case concerned the anti-avoidance approach in Indian domestic law, viz. the meaning of the words 'income accruing or arising, whether directly or indirectly (...) through the transfer of a capital asset situated in India'.

In brief, the facts were the following. The Dutch company Vodafone International Holdings BV (hence: VIH) entered into a share purchase agreement with Hutchison Telecommunications International Limited (HTIL), a Cayman Islands company, for the purchase of the equity share of its subsidiaries. One of these subsidiaries directly and indirectly owned about 52% of the share capital of an Indian company called Hutchison Essar Limited (HEL). After the acquisition, Vodafone International Holdings acquired control over the subsidiaries and their assets, including HEL. The Indian Revenue Service deemed these gains taxable as there was a transfer of a business situated in India. Moreover, the Revenue Authorities alleged failure on the part of VIH to withhold taxes of the gains on the transfer of the shares in the subsidiaries.

Philip Baker subsequently brought up some issues for discussion. He started by noting that tax treaties generally only allow for the taxation of indirect transfers in cases of interests in immovable property.¹⁹ In his opinion, this gave rise to questions as to the extent that tax treaties reflect international tax law and practice and where the taxing right on the disposal of business investments is. He then wondered whether the taxation of indirect transfers should only be an anti-avoidance rule.

Baker also identified a danger for double taxation where a state taxes indirect transfers of business interests, which, in the *Vodafone* case, represented a potential triangular situation. In this regard, however, there is a difference in approach under treaties following the OECD Model and those drafted according to the UN Model. According to Baker this may be mitigated because some states do not tax capital gains and other states refrain from taxing gains by non-residents on situs assets.

2.4 Dividends, Interest and Beneficial Ownership

2.4.1 Economic Double Taxation

Professor Pasquale Pistone discussed an Italian case about tax treaty relief from economic double taxation and the EU Parent–Subsidiary Directive.²⁰ The facts of the case were as follows. An Italian subsidiary paid dividends to its French parent company. In conformity with the EU Parent–Subsidiary Directive, no withholding taxes had been levied on these dividends. Moreover, Article 10(4)(b) of the Franco–Italian double tax treaty granted French parent companies that receive dividends from a company resident in Italy the payment of a tax credit from the Italian Treasury, provided certain criteria were met.²¹ This led the French parent company to claim the credit mentioned in the relevant treaty provision. The Italian tax authorities denied the refund since in conformity with the EU Parent–Subsidiary Directive, the Italian subsidiary had not withheld any taxes on the dividend paid.

From this case, Pistone inferred the following. First, the Court opined that the levying of tax treaty withholding taxes is a condition required for obtaining the tax credit for underlying corporation tax. Withholding tax was therefore due in Italy. The Court explicitly founded its position on Article 7(2) of the EU Parent–Subsidiary and the interpretation of that Article set forth by the European Court of Justice in its *Océ van der Grinten* judgment and repeated in the more recent *Banque Fédérative du Crédit Mutuel*.²² Second, the Court considered the levying of a 5% withholding tax on the reimbursement of tax credit for underlying corporate income taxes in line with the correct interpretation of the double tax treaty. According to the Court, that repayment is in fact to be regarded as a

Notes

¹⁸ Indian Supreme Court, 20 Jan. 2012, *Vodafone International Holdings BV v. Union of India & Anr.* [S.L.P. (C) no. 26529].

¹⁹ For example Art. 13(4) of the OECD Model and Art. 13(4) of the UN Model Tax Convention.

²⁰ Italian Court of Cassation (*Corte di Cassazione*), 15 Apr. 2011, n. 8621.

²¹ Article 10(4)(b) of the Franco–Italian DTC reads as follows: 'A company resident in France, mentioned in paragraph 2(a), or liable to the French law applicable to parent companies, which receives dividends from a company resident in Italy which would entitle a resident of Italy receiving such dividends to a tax credit (*credito d'imposta*), is entitled to a payment from the Italian Treasury equal to half of such tax credit, reduced by the withholding at source at the rate provided in paragraph 2.'

²² ECJ, 4 Oct. 2001, Case C-58/01 (*Océ van der Grinten*) and ECJ 3 Apr. 2008, Case C-27/07. In the *Océ van der Grinten* case, the ECJ allowed for the levying of dividend withholding taxes in connection with a tax treaty clause aimed at giving relief from economic double taxation.

dividend. As was later noted by Professor Vanistendael, an exceptional and striking element of this case is that, as it appears, the Court required juridical double taxation in order to prevent economic double taxation.

2.4.2 Beneficial Ownership

A discussion of the taxation of dividends and interest income is incomplete without elaborations on the concept of beneficial ownership. Professor Søren Friis Hansen of the Copenhagen Business School reviewed the Danish perspective of this topic. More specifically, his case dealt with the interpretation of the term beneficial owner in the Denmark–Luxembourg DTC.²³ The facts of the case can be summarized as follows. A Danish public liability company had been taken over by a group of international investors upon which the company paid a dividend of Danish Krone (DKK) 5.5 billion to its Luxembourg parent. The parent subsequently granted a loan of the same amount to the Danish subsidiary. This course of action led the Danish tax authorities to claim that the Luxembourg parent could not be regarded as the beneficial owner of the dividend and subsequently demanded withholding taxes to be paid. The tax authorities lost the case. The Danish High Court in fact did consider the Luxembourg parent to be the beneficial owner of the dividends and concluded that no dividend withholding taxes were to be levied. The taxpayer's modus operandi did not constitute abuse and the Luxembourg entity was not considered a conduit company. A case of abuse could nevertheless arise if the dividends were in fact transferred or destined to be transferred to non-EU residents of states without a tax treaty with Denmark.

2.5 Royalties and Labour Income

2.5.1 Software License Agreement: IBM Corporation v. Commissioner of Taxation (AUS)

This time discussing the meaning of royalties and software license agreements, Professor Cooper explained the case of *International Business Machines Corporation v. Commissioner of Taxation*.²⁴ The case involved IBMA, an Australian resident company that made payments to the non-resident companies IBM and IBMWT pursuant to a software license agreement. Neither of the two companies had a permanent establishment in Australia and both of them sought a declaration that they were not liable to

Australian tax on the full amount received under the software license agreement. The issue boiled down to whether the software license agreement was a distributor agreement or whether the agreement granted IBMA all rights to deal with IBM's intellectual property for both its own use and for distribution. The court ruled that the license agreement granted IBMA the intellectual property rights necessary for performing its role as a distributor and considered the payments royalties.

2.5.2 The Demarcation between Service Income and Royalties: Goosen v. Commissioner (USA)

This fifth session, on royalties and labour, also clearly underscored the importance of proper demarcation between royalties and labour income. University of Florida, Levin College of Law Professor Yariv Brenner felt that this distinction is not that readily drawn and is far from clear in practice. His case concerned the famous South African golf player Retief Goosen, who is also a non-domiciled resident in the United Kingdom.²⁵ Goosen reaped a lot of success in tournaments in both the United States and in Europe. This success not only resulted in prize money, but also enabled the professional golfer to enter into endorsement agreements with sponsors. Before the US Tax Court, the question was how Goosens endorsement fees were to be characterized – as payments for services or as royalties. The treaty question under the United States–United Kingdom double tax treaty was whether the golfer can be exempt from US taxation on the fees to the extent that the income was remitted to or received in the UK. Goosen held that his income was received in the UK and hence exempt from US taxation under the treaty. The US Tax Court did not follow Goosen, since Goosen had channeled his income through incorporated entities. Therefore, the Court assigned almost the entire income to the US.

2.5.3 Exit Taxes on Pension Rights: Tax Treaty Override?

Next, conference chairman Professor Eric Kemmeren elaborated on a Dutch Supreme Court decision about exit taxation and pensions.²⁶ The case concerned a Dutch taxpayer who worked the whole of 2003 as an employee with a Netherlands resident employer, with whom he had also built up pension rights. In March 2003, the taxpayer emigrated to Belgium, in respect of which he received a

Notes

²³ Danish High Court, December 2011, no. SKM20012.121ØLR.

²⁴ Federal Court of Australia, 12 Apr. 2011, *International Business Machines Corporation v. Commissioner of Taxation*.

²⁵ US Tax Court, 9 Jun. 2011, *Retief Goosen v. Commissioner*, 136 T.C. no. 27 (2011).

²⁶ Dutch Supreme Court, 15 Apr. 2011, no. 10/00990.

protective tax assessment. The assessment concerned the pension claim he had built up before he emigrated. It further included revision interest. The tax collector granted a deferral of payment. The Supreme Court made it clear that a tax triggered by emigration *could* be inconsistent with the principle of good faith to which treaty partners are bound, based on the Vienna Convention on the law of treaties. According to the Court, that would be the case if the Netherlands were to tax a benefit that had been allocated to the state of immigration. However, this would not necessarily lead to a breach of good faith or tax treaty override since a number of treaties do allow the Netherlands as a source state to tax retirement income. Moreover, the protective assessment need only be paid under specific circumstances and the claim is waived after a period of ten years. In cases in which the tax treaty allocates tax jurisdiction to the (new) state of residence, the tax collector may nevertheless not demand tax payment. It was further found irrelevant whether at the time the tax treaty was established, Belgium was aware of (pending) Netherlands exit taxes or that the treaty became effective after the exit tax came into force. Finally, the Supreme Court ruled that the protective tax assessment and the accompanying revision interest did not violate the fundamental freedoms of the Treaty on the Functioning of the European Union, because they can be justified by imperative reasons in the public interest.

2.6 Avoidance of Double Taxation and Mutual Assistance

During the penultimate session, Professor Marjaana Helminen of the University of Helsinki shed light on the interpretation of the credit method article of the Finland–US tax treaty. In fact, Helminen's case concerned the interpretation of the Finnish domestic law rules on the credit method.²⁷ The taxpayer concerned was a Finnish resident who, in 2004, sold two apartments located in the US, resulting in a capital gain that was taxed in the United States. For Finnish tax purposes, the taxpayer deducted a 2003 capital loss from the capital gains. In this respect it did not matter where the capital gains had arisen. The matter in dispute was what the amount of the US tax creditable in Finland should be. Article 23 of the US–Finland double tax treaty in essence only says that Finland has to apply the credit method, without any further details on how this method should be applied. Details on how Finland has to apply the credit method then depend on domestic law provisions. The Supreme Administrative Court decided that, under domestic law,

provisions dictated that the capital loss from the year 2003 must be deducted from the US source capital gain to calculate the credit. Consequently, no income to base the foreign tax credit on was left and most of the US tax could not be credited in Finland.

Dr Daniel Smit (Tilburg University) discussed a somewhat different case in which the Dutch Supreme Court had to decide on the impact of currency losses on loans receivable on the tax credit in respect of the received interest.²⁸ A Dutch resident company had provided significant loans to an affiliated Brazilian company, some of which were denominated in US Dollars. In 2003, the Dutch taxpayer suffered a significant currency loss on its US Dollars loan receivables. In addition, the taxpayer received a substantial amount of interest which was subject to Dutch corporate income tax. The interest had already been subject to Brazilian withholding tax at a rate of 15%. Pursuant to the Netherlands–Brazil tax treaty, the taxpayer subsequently claimed a 20% tax sparing credit. A combined reading of the treaty and the Dutch Double Taxation (Avoidance) Decree 2001 (*Besluit voorkoming dubbele belasting 2001*) limited this credit to the amount of corporate income tax attributable to the received *net* interest income. Analogous to the Finnish case above, the question was whether the currency loss was to be deducted from the interest income – giving rise to a lower credit – or whether it should be ignored in calculating the maximum amount of tax creditable. As opposed to the Finnish Court, the Dutch Supreme Court ruled that the currency loss should be ignored – resulting in a higher tax credit – because the currency loss on the US Dollars loan receivable did not represent interest within the meaning of the Netherlands–Brazil tax treaty. Furthermore, the currency loss did not qualify as attributable expenses within the meaning of the tax treaty read in conjunction with the Dutch Double Taxation (Avoidance) Decree 2001.

2.7 Non-discrimination

2.7.1 Thin Capitalization

The conference was concluded with a session on non-discrimination. Out of the presentations covered under this heading, the subject of thin capitalization proved to be one of major contradiction.

Professor Danil Vinnitskiy of the Ural State Academy of Law elucidated a Russian case in which thin capitalization rules were found to be non-discriminatory.²⁹ In that case, a Russian coal-mining company had debt outstanding to

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²⁷ Supreme Administrative Court, KHO 2011/1325 (45).

²⁸ Dutch Supreme Court, 17 Jun. 2011, no. 10/00076.

²⁹ Supreme Commercial Court, 15 Nov. 2011, *Severny Kuzbass*, no. 8654/11.

Russian, Swiss and Luxemburg resident and affiliated companies. In accordance with Russian domestic tax rules, the taxpayer deducted the respective amounts of interest – which had not actually been paid – from its taxable income in 2008. The Russian tax authorities decided to invoke thin capitalization with regard to the interest due on several of these loans. Under domestic law, thin capitalization rules only apply to Russian companies that have debt outstanding to non-resident companies that – directly or indirectly – hold or control more than 20% of the share capital in that Russian company or vice versa. Consequently, thin capitalization rules do not apply if a Russian company is owned by another Russian resident and/or if the debt is not controlled by a foreign entity. Since several Russian tax treaties generally follow the OECD Model and contain articles on non-discrimination, the taxpayer had doubts about the compatibility of the Russian thin capitalization rules with those tax treaties, which moreover take precedence over Russian domestic law. In contradiction with the lower courts, the Russian Supreme Court held that the facts of the case did not give the necessary grounds for invoking the non-discrimination clause, arguing among other things that tax treaties do not preclude the introduction of domestic anti-avoidance measures. Moreover, the relevant tax treaties provided for special tax treatment when taxpayers' loans diverge significantly from the arm's length standards.

To put matters in perspective, Professor José Manuel Almudí Cid of Complutense University Madrid highlighted a case in which the Spanish Supreme Court ruled in favour of the taxpayer. The Court stated that thin capitalization rules do not apply to a loan guaranteed by a related party entitled to the benefits from a Spanish tax treaty containing a non-discrimination clause.

2.7.2 Cross-Border Group Consolidation

The conference's final case was presented by Professor Alexander Rust, who dealt with a German case on trade taxation (*Gewerbesteuer*).³⁰ The facts of the case were as follows. A German parent company had taken out a loan with the UK grandparent and subsequently lent these funds to its subsidiary. In return, the subsidiary made interest payments to the parent. For trade tax purposes,

the subsidiary could not deduct the interest payments made to its parent. The GmbH tried to avoid this non-deductibility by filing for a consolidated tax return (through a so-called *Organschaft*). However, as the parent was controlled by a UK – and not by a German – resident, the requirements for consolidation were not fulfilled and the interest remained non-deductible. The Court ruled that this differential treatment gave rise to tax consequences that were more burdensome than the taxation and connected requirements to which other similar German enterprises would be subjected and considered the differential treatment incompatible with the non-discrimination clause of the Germany–UK tax treaty. The non-discrimination provisions thus allowed for a cross-border consolidation for associated enterprises. The Court went on to note that even the prevention of double non-taxation due to the cross-border consolidation could not justify the differential treatment of a resident enterprise controlled by a foreign entity. The Court added that Article 7 in conjunction with Article 5(7) of the Germany–UK tax treaty prevented Germany from taxing the UK grandparent. Quite remarkably, this meant that the results of the German subsidiary (including the loss deriving from the deduction) had to be allocated to the UK grandparent as a result of the consolidation.

3 FINAL REMARKS

Tax treaties are by their very nature an international phenomenon. Traditionally they have dealt with issues of international double taxation that may arise in cross-border situations and transactions. In an ever globalizing world, it is important to monitor the relevant developments in this field and to learn from each other about the interpretation and application of such treaties, the ideal being the creation of one common approach. The journey around the world that was undertaken in Tilburg was thus a more than welcome approach. This is obviously a long journey that can only be taken one step at a time. The cases discussed at the conference can provide direction to where we are going and can be considered a valuable contribution to this end.

³⁰ Bundesfinanzhof 9 Feb. 2011, I R 54, 55/10, ISr 2011, 345.

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